IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LIBERTY MEDIA CORPORATION and LIBERTY MEDIA LLC, Plaintiffs, v. THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., as Trustee, Defendant.	)	C.A. No. 5702-VCL

MEMORANDUM OPINION

Date Submitted: April 6, 2011
Date Decided: April 29, 2011

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LASTER, Vice Chancellor.

Plaintiffs Liberty Media Corporation ("LMC") and its wholly owned subsidiary Liberty Media LLC ("Liberty Sub," together with LMC, "Liberty") have proposed to split off as a new publicly traded company ("SplitCo") the businesses, assets, and liabilities attributed to Liberty's Capital Group and Starz Group (the "Capital Splitoff"). Certain bondholders wrote to Liberty and objected to the Capital Splitoff.

In their objection, the bondholders contended that Liberty has pursued a "disaggregation strategy" designed to remove assets from the corporate structure against which the bondholders have claims and shift the assets into the hands of Liberty's stockholders. The Capital Splitoff will be Liberty's fourth major distribution of assets since March 2004. The bondholders argued that when aggregated with the previous three transactions, the Capital Splitoff would violate a successor obligor provision in an indenture dated July 7, 1999 (as amended and supplemented, the "Indenture") pursuant to which Liberty agreed not to transfer substantially all of its assets unless the successor entity assumed Liberty's obligations under the Indenture.

Faced with a threatened event of default, Liberty brought this action for declaratory and injunctive relief against defendant Bank of New York Mellon in its capacity as indenture trustee (the "Trustee"). It is undisputed that, if examined in isolation, the Capital Splitoff would not constitute a transfer of substantially all of Liberty's assets or violate the successor obligor provision. In this post-trial decision, I find that the four transactions cannot be aggregated. Judgment is therefore entered for Liberty.

I. FACTUAL BACKGROUND

What follows are the facts as found after trial. I have placed the burden of proof on Liberty for all issues. *See Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 739 (Del. Ch. 2008). There is pre-*Hexion* authority indicating that the burden of proof should remain on the natural plaintiff. *See Tenneco Auto. Inc. v. El Paso Corp.*, 2004 WL 3217795, at *13-14 (Del. Ch. Aug. 26, 2004). The Trustee is the natural plaintiff for purposes of a dispute over the Indenture, because if Liberty had not filed a declaratory judgment action, the Trustee could have pursued a claim for breach of contract. I have followed *Hexion* as the more recent and factually comparable authority. The resulting allocation favors the Trustee.

A. Liberty's Emergence and Early Evolution

For two decades, Liberty has enjoyed a dynamic and protean existence under the leadership of its founder and chairman, Dr. John Malone. Liberty emerged in 1991 from Tele-Communications, Inc. ("TCI"), then the largest cable television operator in the United States, when a threat of federal regulation led TCI to separate its programming assets from its cable systems. TCI formed Liberty and offered its stockholders the opportunity to exchange their TCI shares for Liberty shares. At the time, Malone was Chairman, CEO, and a large stockholder of TCI. After the exchange offer, Malone was also Chairman, CEO, and a large stockholder of Liberty.

In 1994, Bell Atlantic entered into merger discussions with TCI. Bell Atlantic insisted that Liberty's assets be part of any acquisition. To facilitate a transaction, TCI reacquired Liberty by merger. The discussions with Bell Atlantic broke down, but Liberty remained part of TCI.

In 1998, Malone convinced AT&T to acquire TCI by merger at a significant premium. *See In re Tele-Commc'ns, Inc. S'holders Litig.*, 2005 WL 3642727, at *1-3 (Del. Ch. Dec. 21, 2005). In the transaction, both TCI and Liberty became wholly owned subsidiaries of AT&T. The agreement with AT&T allowed Liberty to operate autonomously, and Liberty's assets and businesses were attributed to a separate tracking stock issued by AT&T. Malone served as Liberty's Chairman.

B. The Indenture

While a subsidiary of AT&T, Liberty entered into the Indenture. From July 7, 1999 through September 17, 2003, Liberty issued multiple series of publicly traded debt under the Indenture for total proceeds of approximately $13.7 billion. Liberty has since retired or repurchased much of that debt. As of September 30, 2010, debt securities with a total balance of approximately $4.213 billion remained outstanding.

Name of Security and Interest Rate	**Date of Issue**	**Original Amount**	**Balance as of 9/30/2010**
8.5% Senior Debentures Due 2029	7/7/99	$500 million	$287 million
4% Exchangeable Senior Debentures Due 2029	11/16/99	$869 million	$469 million
8.25% Senior Debentures Due 2030	2/2/00	$1 billion	$504 million
3.75% Exchangeable Senior Debentures Due 2030	2/10/00 3/8/00	$750 million (2/10/00) $60 million (3/8/00)	$460 million
3.5% Exchangeable Senior Debentures Due 2031	1/11/01	$600 million	$490 million
3.25% Exchangeable Debentures Due 2031	3/8/01	$817.7 million	$541 million
3.125% Exchangeable	3/26/03	$1.75 billion	$1.138 billion

Senior Debentures Due 2023			
5.7% Senior Notes Due 2013	5/5/03	$1 billion	$324 million

C. The Terms of the Indenture

The Indenture includes a successor obligor provision. This provision prohibits Liberty from selling, transferring, or otherwise disposing of "substantially all" of its assets unless the entity to which the assets are transferred assumes Liberty's obligations under the Indenture (thereby releasing Liberty from its obligations). Section 801 of the Indenture provides, in pertinent part:

> [Liberty Sub] shall not consolidate with or merge into, or sell, assign, transfer, lease, convey or other[wise] dispose of all or substantially all of its assets and the properties and the assets and properties of its Subsidiaries (taken as a whole) to, any entity or entities (including limited liability companies) unless:
>
> (1) the successor entity or entities . . . shall expressly assume, by an indenture (or indentures, if at such time there is more than one Trustee) supplemental hereto executed by the successor Person and delivered to the Trustee, the due and punctual payment of the principal of, any premium and interest on and any Additional Amounts with respect to all the Securities and the performance of every obligation in this Indenture and the Outstanding Securities on the part of [Liberty Sub] to be performed or observed . . . ;
>
> (2) immediately after giving effect to such transaction or series of transactions, no Event of Default or event which, after notice or lapse of time, or both, would become an Event of Default, shall have occurred and be continuing; and
>
> (3) either [Liberty Sub] or the successor Person shall have delivered to the Trustee an Officers' Certificate and an Opinion of Counsel [containing certain statements required by Section 801].

Indenture § 801 (the "Successor Obligor Provision"). A failure to comply with the obligations imposed by Article Eight constitutes an "Event of Default." *Id.* § 501.

The Indenture does not define the phrase "substantially all." The Indenture does not contain any covenants requiring Liberty to maintain a particular credit rating, a minimum debt coverage ratio, or a minimum asset-to-liability ratio. *Compare, e.g.*, Committee on Trust Indentures and Indenture Trustees, ABA Section of Business Law, *Model Negotiated Covenants and Related Definitions*, 61 Bus. Law. 1439 (2006) (providing model covenants addressing these topics); Thomas O. McGimpsey & Darren R. Hensley, *Successor Obligor Clauses: Transferring "All of Substantially All" Corporate Assets in Spin-Off Transactions*, Colorado Lawyer 45 (Feb. 2001) (describing different forms of covenants). The Indenture does not contain any provision directly addressing dividends and stock repurchases, which are the corporate vehicles for a spinoff (stock dividend) and splitoff (stock redemption).

D. Liberty's Continued Evolution Since the Splitoff From AT&T

In August 2001, AT&T split off Liberty to the holders of its publicly traded Liberty tracking stock. When it re-emerged as a public company, Liberty held a "fruit salad" of assets, consisting mainly of minority equity positions in public and private entities. For example, Liberty owned single-digit-percentage stakes in large public companies like Sprint, Viacom, and Motorola. Liberty also owned large minority positions in private companies like Discovery Communications. Most of Liberty's assets, except for a few controlled operating businesses, did not generate cash flow. The value of Liberty's holdings, which had been quite significant during the heady days of the internet bubble (recall that the Indenture was executed in 1999), fell significantly in 2000 and 2001 (the period leading up to the splitoff).

After the splitoff, Malone and the rest of Liberty's management team set out to build value at Liberty by rationalizing its investment portfolio. Put simply, Liberty wanted to use its minority investments to acquire controlling stakes in mutually supporting operating businesses that would generate cash flow. According to Malone,

> it was always obvious that the direction that the company needed to go – which was to – out of the cosmic dust, as it were, form some gravitational units that could then pull in these investment assets, monetize them and grow. It's always been a process of how do you convert from a portfolio of investments into a series of operating businesses.

Tr. 25.

Beginning in 2001, Liberty sought to own stakes in businesses that Liberty controlled or where Liberty saw a clear path to control. If Liberty did not control an asset and could not identify a path to control, then Liberty management evaluated all possible alternatives for the asset. Over the ensuing decade, Liberty engaged in numerous transactions in pursuit of its overall strategy, frequently structuring its deals as swaps or exchanges to avoid triggering taxable events.

1. International Cable

After separating from AT&T, Liberty looked first to build a cash-generating business in the area its management team knew best: cable television. Having sold the nation's largest cable provider to AT&T in 1999, Malone did not think it was feasible to make a comeback in the U.S. Instead, Liberty sought to expand on and consolidate its international cable holdings.

A series of international deals ensued. In 2001, Liberty agreed to acquire the largest cable television business in Germany from Deutsche Telekom. In 2002, Liberty increased its stake in UnitedGlobalCom, Inc. ("UGC"), a cable provider active in Europe and Latin America. In 2002 and 2003, Liberty increased its stakes in Jupiter Telecommunications and Jupiter Programming Company, two cable businesses in Japan.

But Liberty's efforts to create an international cable business ran into obstacles. The Deutsche Telekom deal fell apart after encountering problems with German regulators. By 2004, it was clear that creating an international cable business would require massive capital infusions that would need to be funded with additional debt. Liberty management determined that the most effective way to raise capital would be to move the international assets off Liberty's balance sheet and into a separate entity. The new entity could raise debt on its own, and the risks of international expansion would be borne "directly by those shareholders of Liberty Media who chose to do so, rather than by the company at large." Tr. 108-09.

Thus, in 2004, Liberty spun off Liberty Media International, Inc. ("LMI"), which held Liberty's controlling interest in UGC and stakes in other international cable companies. Liberty also contributed to LMI shares of News Corp. preferred stock, a 99.9% economic interest in 345,000 shares ABC Family Worldwide preferred stock, and $50 million in cash.

Liberty management believed that the LMI spinoff would best serve both Liberty and the new entity:

> Creating a separate equity security will give existing Liberty Media shareholders and new investors the ability to concentrate their investment in either LMI, the remaining Liberty Media businesses, or both. We expect that this will increase the trading value of both securities, thereby reducing the discount in the current Liberty Media stock and creating better

> currencies for both entities to use in pursuit of acquisition activity. In addition, by their nature the LMI businesses can support higher levels of debt, which should generate higher equity returns.

JX 35 at 7.

The LMI spinoff was a significant transaction for Liberty. It removed $11.79 billion in assets (at book value) from Liberty's balance sheet, representing 19% of Liberty's total book value as of March 31, 2004, the date that the Trustee contends should be used for purposes of determining what constituted "substantially all" of Liberty's assets. At the same time, Liberty avoided exposing itself to the massive borrowing that the international cable business required. If Liberty had retained the international assets and undertaken the transactions in which LMI later engaged, Liberty today would have an additional $21 billion in liabilities on its consolidated balance sheet, all senior to the debt issued under the Indenture.

Notwithstanding the risks it faced, LMI has proved successful. The spun-off company, later renamed Liberty Global, Inc., is currently the largest cable operator outside of the United States. In 2009, Liberty Global reported assets (at book value) of $39.9 billion, total revenue of $11.1 billion, and operating income of $1.64 billion.

The Trustee views the LMI spinoff as the start of Liberty's disaggregation strategy. Commenting on the LMI spinoff in early 2005, Malone described it as "the first shoe to drop" and a "model we want to follow." JX 339 at 36.

> That's what we continuously look for . . . opportunities to carve out if necessary other businesses that can go off and be part of a consolidation in their space, gain market power, improve profitability, appropriately use debt leverage, shelter taxes, or avoid corporate level taxes, and go on down

> the road in terms of maximizing shareholder value . . . . And that continues to be the plan today.

Id.; *accord* Tr. 54-55 (Malone testifying that Liberty's strategy was to "[c]onsolidate on the operating businesses, and figure out how to disaggregate the businesses where we couldn't find an efficient way to own, consolidate, and grow assets, that we hadn't been able to figure out how to do that").

2. QVC

At the same time that Liberty management was attempting to develop a cash-generating international cable business, they also were evaluating another of Liberty's legacy investments: its minority stake in QVC, Inc. QVC was and remains the dominant cable shopping channel, and Liberty management liked QVC's "position as a market leader in its industry, . . . QVC's ability to generate significant cash from operations and Liberty's ability to obtain access to such cash, and . . . QVC's perceived significant international growth opportunities." JX 30 at II-49.

In September 2003, Liberty acquired control over QVC by purchasing Comcast Corporation's approximately 56.5% ownership stake for approximately $7.9 billion. Liberty paid $1.35 billion of the purchase price in cash, raised via the issuance of additional debt under the Indenture. Liberty also issued $4 billion in Floating Rate Senior Notes under the Indenture directly to Comcast. Liberty paid the balance of the purchase price with 217.7 million shares of Liberty Series A common stock, valued at $2.555 billion.

3. Discovery

Also during 2003 and 2004, Liberty management explored alternatives for Discovery, a cable channel that Liberty owned in partnership with Cox Communications and Advance/Newhouse. Discovery was performing well, but Liberty owned less than 50% of the equity, lacked control, did not have a clear path to control, and was restricted by a stockholders agreement from selling or otherwise monetizing its position.

Consistent with its strategy of moving from minority positions into control positions, Liberty approached its partners in an effort to develop a path to control. When these efforts failed, Liberty attempted to explore plans for monetizing the business by selling it or taking it public. Liberty's partners were not interested.

With their preferred alternatives blocked, Malone and the Liberty management team decided to dividend Liberty's Discovery shares to its stockholders, giving them a direct ownership stake in Discovery. Liberty management hoped that as a result of the distribution, Cox Communications and Advance/Newhouse "would perhaps ultimately see the benefit of a public vehicle for valuation and management motivation." Tr. 44-45. To facilitate the distribution, Liberty created Discovery Holding Company, transferred to it Liberty's stake in Discovery, a small operating company called Ascent Media, and $200 million in cash, and then spun off the new entity to Liberty's stockholders.

The Discovery spinoff removed assets with a book value of $5.825 billion from Liberty's balance sheet, representing 10% of Liberty's total book value as of March 31, 2004. After the spinoff, Liberty's securities lost their investment-grade rating. Moody's cited concern with "management's long-term strategic and financial vision for the company, and likely resultant credit protection levels." JX 56. Moody's noted that "[t]he rating could stabilize if management evidenced both the ability and willingness to maintain or improve the asset coverage that represents the primary source of credit protection levels at present." JX 59.

Like LMI, Discovery has prospered post-spinoff. In 2009, Discovery reported assets with a book value of $10.997 billion, revenues of $3.5 billion, and operating income of $1.24 billion.

The Trustee points to the Discovery spinoff as a continuation of Liberty's "disaggregation strategy." In its 2004 shareholder letter, Liberty management stated that

> [s]ince Liberty's inception 14 years ago, our overriding objective has been clear and consistent: to maximize the value of our shares. Over the years, we have accomplished this by executing three core strategies: owning businesses with significant built-in growth potential; making timely acquisitions that enable us to build on that growth potential and create new business lines; and actively managing our capital structure. In 2004, we introduced a fourth strategy of disaggregating businesses by distributing them to our shareholders. While this technique actually reduces the value of our shares, it also increases the wealth of our shareholders by giving them holdings in two companies instead of one.

JX 54 at 1. Malone emphasized the disaggregation strategy in other public statements:

> [T]he focus at Liberty has been figuring out how to rationalize the compliment of assets that we have, how to regain market share in those businesses that we think have that potential and how to avoid double or triple taxation as we attempt to exploit the underlying values of the assets. And that's led us kind of to voice a philosophy right now for Liberty, which is disaggregate in order to consolidate . . . .

JX 337 at 2.

4. The Interactive and Capital Tracking Stocks

On November 9, 2005, Liberty announced the creation of two tracking stocks, one for Liberty's Interactive Group and the second for Liberty's Capital Group. Liberty created the tracking stocks to "help the investment and analyst communities to focus their attention on the underlying value of [Liberty's] assets." JX 70 at 6. At the same time, Liberty management recognized that the trackers could serve as a first step toward future splitoffs. As Malone explained during Liberty's third quarter 2005 earnings call:

> As you know, we have spun off the international business and organized it. We've spun off Discovery Holdings and in the process of optimizing it, and so this creation of Liberty Interactive clearly signals a desire long-term for an ultimate separation, but it gives us the latitude to optimize taxes and take our time in the structuring of our debt liabilities and tax liabilities in the pendency of any ultimate spin off.

JX 346 at 4. Malone noted that the creation of the trackers did not negatively affect Liberty's bondholders, because "during the pendency of a tracking stock structure, there is really no change in terms of the assets that the debtholders can look to." *Id.* at 5. The Trustee infers from this statement that Malone knew that a splitoff would have a different and negative effect on Liberty's bondholders.

5. More Deal-Making and Another Tracking Stock

In late 2004, News Corporation ("News Corp.") announced its intention to reincorporate from Australia to Delaware. Liberty management saw a chance to increase Liberty's stake in News Corp. and acquired approximately 16% of News Corp.'s stock through a combination of open-market purchases and derivatives. Malone correctly anticipated that News Corp.'s controlling stockholders, the Murdoch family, would not welcome Liberty's involvement and that their desire to address Liberty's position would create opportunities for deal-making. After two years of negotiating, Liberty agreed in late 2006 to exchange its News Corp. stake for (i) a 38.5% interest in DirecTV, (ii) three regional sports networks, and (iii) $550 million in cash.

Meanwhile, Liberty continued to pursue transactions on other fronts involving both exchanges of minority positions for wholly owned assets and outright acquisitions. In April 2007, Liberty agreed to exchange its minority stake in CBS Corporation for ownership of a CBS local television station and $170 million in cash. In May 2007, Liberty exchanged a portion of its minority investment in Time Warner Inc. for ownership of the Atlanta Braves baseball organization, Leisure Arts, Inc., and $984 million in cash. Over the course of 2006 and 2007, Liberty acquired IDT Entertainment (later renamed Starz Media), Provide Commerce, Inc., FUN Technologies, Inc., BuySeasons, Inc., and Backcountry.com, Inc. In 2008, Liberty attributed Starz Media and other entertainment-related assets to a new tracking stock group called the Entertainment Group. This resulted in Liberty's assets being divided between three tracking stock groups, the Interactive Group, the Entertainment Group, and the Capital Group.

6. Liberty Entertainment

The News Corp. swap gave Liberty an influential position in DirecTV. Consistent with its overall strategy, Liberty sought a path to control, and in April 2008 Liberty purchased another 78.3 million shares of DirecTV for consideration of $1.98 billion in cash. Restrictions in the DirecTV certificate of incorporation, however, prohibited Liberty from acquiring more than 50% of DirecTV's equity unless Liberty offered to purchase 100% of the outstanding stock. To avoid triggering this provision, Liberty and DirecTV agreed that Liberty's equity ownership could exceed the 50% threshold, but Liberty's voting power would be capped at 48.5%. As a result of DirecTV's stock repurchase program, Liberty's equity ownership eventually climbed to 57%, although Liberty's voting power never exceeded 48.5%.

As 2008 wore on and the financial markets deteriorated, Liberty's management realized that financing to acquire the balance of DirecTV was not available. With the DirecTV charter provision otherwise blocking Liberty's path to control, Liberty management examined other potential alternatives. Ultimately, Liberty announced that it would split off its interest in DirecTV, along with certain other business, as a new entity called Liberty Entertainment, Inc. ("LEI"). Liberty and DirecTV then negotiated a transaction in which LEI would combine with DirecTV immediately after the splitoff. The splitoff and merger closed on November 19, 2009.

Liberty initially planned to split off all the assets attributed to the Entertainment Group, including the DirecTV stake, Starz, FUN Technologies, Inc., Liberty Sports Holdings, LLC, GSN, LLC and WildBlue Communications. Liberty management believed that DirecTV was undervaluing Starz and WildBlue in the merger negotiations, so Liberty decided to retain those assets. Liberty management also considered the potential effect of the splitoff on bondholders. At the time, Malone stated that "[w]e had to retain [the] cash and economic value of Starz in order to reassure the bondholders in Liberty that their interests were being protected." JX 146. The Trustee cites this statement as evidence that Liberty knew its disaggregation strategy was approaching the "substantially all" limit. Malone and Liberty CEO Gregory Maffei testified at trial that they did not believe Liberty was legally required to hold back Starz and cash from the splitoff but rather did so to protect Liberty during the height of the financial crisis and reassure bondholders and lenders.

The LEI splitoff removed assets with a book value of $14.2 billion from Liberty's balance sheet, representing 23% of Liberty's asset base as of March 31, 2004. The splitoff also removed roughly $2.2 billion in short-term debt that went with LEI. DirecTV is now the world's leading provider of digital television entertainment services. In 2009, DirecTV reported assets with a book value of $18.26 billion, revenues of $21.57 billion, and operating profit of $2.67 billion. Malone served as Chairman of DirecTV until April 6, 2010.

7. Sirius And IAC

As the first decade of the new millennium wound down, Malone and his team continued their deal-making. In February 2009, the ongoing financial crisis served up the chance to make a favorable investment in Sirius XM Radio Inc. In return for a loan of $530 million, Liberty received shares of Sirius XM preferred stock, convertible into a 40% common stock interest, and a proportionate number of seats on Sirius XM's board. Liberty agreed to cap its stake at 50% until 2012. Sirius XM has since repaid the loan, while Liberty continues to hold its equity stake.

In December 2010, Liberty engaged in another swap transaction. Liberty exchanged its equity stake in InterActiveCorp ("IAC"), a company controlled by Barry

Diller, for sole ownership of IAC's Evite.com and Gifts.com businesses and approximately $220 million cash.

E. The Proposed Splitoff

In June 2010, Liberty announced the Capital Splitoff, in which Liberty proposes to split off the businesses allocated to its Capital and Starz Groups as a new public entity. SplitCo will own Starz Entertainment, Starz Media, Liberty Sports Interactive, Inc., the Atlanta Braves, True Position, Inc., and Liberty's interest in Sirius XM. The assets to be split off have a book value of $9.1 billion, representing 15% of Liberty's total assets as of March 2004. Malone is expected to serve as Chairman of the new entity's board, and Maffei is expected to serve as CEO.

After the Capital Splitoff, Liberty will hold the businesses attributed to Liberty's Interactive Group, consisting primarily of QVC, several e-commerce businesses (including Evite, Gifts.com, BuySeasons, and Bodybuilding.com), and minority equity stakes in Expedia, the Home Shopping Network ("HSN"), and Tree.com (which operates Lending Tree). All of the outstanding debt securities issued by Liberty will remain obligations of Liberty following the Capital Splitoff. Liberty's board analyzed Liberty's ability to service its debts after the splitoff, including debt at the QVC level and concluded that Liberty will have no difficulty servicing its debt.

II. LEGAL ANALYSIS

The parties dispute whether Liberty has breached the Successor Obligor Provision by disposing of substantially all its assets. It is undisputed that the Capital Splitoff standing alone does not comprise substantially all of Liberty's assets. The threshold question is therefore whether the Capital Splitoff should be aggregated with the prior spinoffs of LMI and Discovery and the splitoff of LEI. Phrased differently, the threshold question is whether Liberty's business mix following the Capital Splitoff in 2011 should be compared with Liberty's business mix before the LMI spinoff in March 2004. The Indenture is governed by New York law, which controls the analysis. Indenture § 113.

A. The Aggregation Principle

Transactions theoretically can be aggregated for purposes of a "substantially all" analysis. The Successor Obligor Provision recognizes that aggregation may occur by providing that Liberty can comply with the Successor Obligor Provision only if "immediately after giving effect to such transaction *or series of transactions*, no Event of Default or event which, after notice or lapse of time, or both, would become an Event of Default, shall have occurred and be continuing." Indenture § 801(2) (emphasis added). Authoritative commentary takes the same view. *See* Ad Hoc Committee for Revision of the 1983 Model Simplified Indenture, *Revised Model Simplified Indenture*, 55 Bus. Law. 1115, 1134-35, 1186-87 (2000) ("In the context of asset disposition by transfer or lease, serious consideration must be given to the possibility of accomplishing piecemeal, in a series of transactions, what is specifically precluded if attempted as a single transaction."). Courts applying New York law have recognized that, under appropriate circumstances, multiple transactions can be considered together when determining whether a transaction constitutes a sale of all or substantially all of a corporation's assets.[1] None of these sources, however, has articulated a clear standard for determining when transactions should be aggregated.

B. The Step-Transaction Doctrine

In *Noddings Investment Group, Inc. v. Capstar Communications, Inc.*, 1999 WL 182568 (Del. Ch. Mar. 24, 1999), this Court was asked to determine whether a spinoff and merger could be considered together for purposes of an adjustment provision in a warrant governed by New York law. Chancellor Chandler analyzed the facts under the step-transaction doctrine, which

> treats the "steps" in a series of formally separate but related transactions involving the transfer of property as a single transaction, if all the steps are substantially linked. Rather than viewing each step as an isolated incident, the steps are viewed together as components of an overall plan.

Id. at *6 (quoting *Greene v. United States*, 13 F.3d 577, 583 (2d Cir. 1994)).[2]

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[1] *See Sharon Steel v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1051-52 (2d Cir. 1982) (comparing assets acquired by successor corporation to assets held by debtor corporation one and a half years earlier, prior to two third-party asset sales, when determining whether successor corporation acquired "substantially all" of the debtor's assets); *In re Associated Gas & Elec. Co.*, 61 F. Supp. 11, 28-31 (S.D.N.Y. 1944) (treating transfers of subsidiaries by one controlled company to a second over a course of three years as a sale of substantially all assets where the transactions were "parts of a single scheme"), *aff'd*, 149 F.2d 996 (2d Cir. 1945); *U.S. Bank Nat'l Ass'n v. Angeion Corp.*, 615 N.W.2d 425, 432-33 (Minn. Ct. App. 2000) (reversing grant of summary judgment to debtor and finding that issues of fact existed as to whether two transactions viewed together constituted a sale of substantially all of the issuer's assets).

[2] *See also In re Kelly*, 2005 WL 3879099, at *7-8 (N.Y. Div. Tax. App. Dec. 8, 2005) (applying step-transaction doctrine to aggregate, for tax purposes, a "series" of real estate transactions which were in substance a single deal); *Gatz v. Ponsoldt*, 925 A.2d 1265, 1280 & n.31 (Del. 2007) (citing various doctrines, including step transaction, in connection with observation that Delaware Courts should look to the substance of transactions, rather than form); *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609,

The step-transaction doctrine applies if the component transactions meet one of three tests. First, under the "end result test," the doctrine will be invoked "if it appears that a series of separate transactions were prearranged parts of what was a single transaction, cast from the outset to achieve the ultimate result." *Id.* (internal quotation omitted). Second, under the "interdependence test," transactions will be treated as one if "the steps are so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series." *Id.* (internal quotation omitted). The third and "most restrictive alternative is the binding-commitment test under which a series of transactions are combined only if, at the time the first step is entered into, there was a binding commitment to undertake the later steps." *Id.* (internal quotation omitted). *See generally In re Big V Hldg. Corp.*, 267 B.R. 71, 92-93 (Bankr. D. Del. 2001) (describing tests).

Viewed with the benefit of doctrinal hindsight, the leading decision on aggregating transactions for purposes of a "substantially all" analysis – *Sharon Steel* – fits within the step-transaction framework. There, UV Industries, Inc. ("UV") agreed in December 1978 to sell its principal subsidiary, Federal Pacific Electric Company, for $345 million in cash. In 1978, Federal generated 60% of UV's operating revenue and 81% of its operating profits. Federal also comprised 44% of UV's total assets (at book value), and 53% of its operating assets. In January 1979, UV announced its intention to sell its

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at *9-10 (Del. Ch. Sept. 14, 2007) (applying step-transaction doctrine; treating amendment to limited partnership agreement and subsequent merger as "part and parcel of one integrated transaction").

remaining assets and liquidate. In March 1979, UV's stockholders approved the sale of Federal and the liquidation plan, and the Federal sale was consummated. In July 1979, UV agreed to sell various oil and gas properties, comprising approximately 5% of its total assets at book value, for $135 million. Finally, in November 1979, UV agreed to sell all of its remaining assets, primarily consisting of UV's Mueller Brass subsidiary, UV's mining properties, and $322 million in cash and cash equivalents, to Sharon Steel Corp. for $518 million. In 1978, Mueller Brass and the mining operations generated 38% of UV's operating revenue and 13% of its operating profits and comprised 34% of UV's total assets (at book value) and 41% of its operating assets. Sharon Steel agreed to assume all of UV's liabilities, including its outstanding debt.

Under UV's original plan of liquidation, the holders of UV's outstanding debentures would have had their obligations repaid in full. Under the contemplated sale to Sharon Steel, the debentures would be assumed by Sharon Steel and remain outstanding. The indenture trustees declared an event of default, and Sharon Steel brought suit.

Under the indenture governing UV's debentures, as under the Indenture in this case, a successor corporation only could assume UV's obligations if UV sold all or substantially all of its assets in the transaction. Certain holders of the debentures (who intervened in the litigation to assert their claims and were certified as class representatives) contended that the assets sold to Sharon Steel did not constitute substantially all of UV's assets and that UV accordingly had defaulted under the indenture. The district court entered judgment in favor of the debenture holders.

On appeal, the Second Circuit affirmed the relevant part of the ruling. Writing for the panel, Judge Ralph K. Winter rejected UV's overly simplistic, "literalist approach" under which Sharon Steel necessarily acquired all of UV's assets because it purchased everything that was left at the time of the sale. *Id.* at 1049. He distinguished sales of assets "in the regular course of UV's business" from *seriatim* sales as part of "an overall scheme to liquidate." *Id.* at 1050.

> To the extent that a decision to sell off some properties is not part of an overall scheme to liquidate and is made in the regular course of business it is considerably different from a plan of piecemeal liquidation, whether or not followed by independent and subsequent decisions to sell off the rest. A sale in the absence of a plan to liquidate is undertaken because the directors expect the sale to strengthen the corporation as a going concern. A plan of liquidation, however, may be undertaken solely because of the financial needs and opportunities or the tax status of the major shareholders. In the latter case, relatively quick sales may be at low prices or may break up profitable asset combinations, thus drastically increasing the lender's risks if the last sale assigns the public debt. In this case, for example, tax considerations compelled completion of the liquidation within 12 months.

Id. The court concluded that the successor obligor provision would not permit a borrowing corporation "to engage in a piecemeal sale of assets, with concurrent liquidating dividends to that point at which the asset restrictions of an indenture prohibited further distribution." *Id.* at 1051. If the "substantially all" analysis considered only the assets held by the corporation at that point, then "[t]he assignment of the public debt might thus be accomplished, even though the last sale might be nothing more than a cash for cash transaction in which the buyer purchases the public indebtedness." *Id.*

To avoid this result, Judge Winter held that "boilerplate successor obligor clauses do not permit assignment of the public debt to another party in the course of a liquidation unless 'all or substantially all' of the assets of the company *at the time the plan of liquidation is determined upon* are transferred to a single purchaser." *Id.* (emphasis added). He found that the evidence supported a *de facto* plan of liquidation that UV embarked on at least as early as March 26, 1978, when the plan of liquidation was approved by the stockholders. Although only the Federal transaction had been identified at that point, UV had decided upon and was pursuing the end result of liquidation. Having reached this conclusion, it was "not difficult" to determine whether UV transferred substantially all of its assets to Sharon Steel. *Id.* When UV embarked on its plan of liquidation, it owned Federal, its oil and gas properties, Mueller Brass, various mining properties, and cash and other liquid assets. UV transferred to Sharon Steel only Mueller Brass, the mining properties, and cash and liquid assets. Together, those assets contributed only 38% of UV's 1978 operating revenues, 13% of its operating profits, and constituted 41% of the book value of its operating assets and 51% of its total assets. The question of whether this constituted substantially all of UV's assets was "not . . . even close." *Id.*

Since *Sharon Steel*, one court has used a version of the step-transaction doctrine to determine whether formally separate transactions should be aggregated as a sale of substantially all of a corporation's assets. *See Int'l Specialty Prods., Inc. v. Dexter Corp.*, 2000 WL 35453111 (D. Conn. July 27, 2000) [hereinafter *ISP*]. Although the decision provides support for using the step-transaction doctrine, the decision applied that doctrine in a strained fashion that seems (in my view) inconsistent with *Noddings* and *Sharon Steel*.

In *ISP*, the eponymous plaintiff, International Specialty Products Corporation ("ISP"), made an unsolicited proposal to acquire the defendant, Dexter Corporation, for $45 per share. The Dexter board of directors responded by exploring strategic alternatives. After failing to find a buyer for the whole company, the board explored sales of Dexter's three principal businesses. On June 20, 2000, the board approved the sale of Dexter's nonwoven materials business to Ahlstrom Paper Group. At Ahlstrom's insistence, the sale was conditioned on a favorable vote from Dexter's stockholders. The board also approved the sale of Dexter's electronic materials and specialty polymers business to Loctite Corporation, but this transaction was *not* conditioned on stockholder approval. Once consummated, these transactions would leave Dexter with a 75% ownership stake in Life Technologies, Incorporated as its principal asset.

On June 26, 2000, less than a week after the Dexter board approved the Ahlstrom and Loctite sales, Invitrogen Corporation proposed to acquire Dexter for $62.50 per share, with a portion of the consideration to come from the proceeds of the asset sales. Invitrogen was only interested in Life Technologies and explained in its proposal that the recently announced asset sales "eliminate[d] some of the complexity of a transaction with Dexter." *Id.* at *1. The Dexter board approved the proposed merger with Invitrogen.

ISP then launched a tender offer for Dexter and filed suit contending that Dexter was selling substantially all of its assets. Even though stockholders already were voting on the Ahlstrom sale and the Invitrogen merger, ISP argued that the Loctite sale also required stockholder approval under the Connecticut analogue to Section 271 of the Delaware General Corporation Law (the "DGCL"), 8 *Del. C.* § 271. ISP conceded that the Loctite sale did not require stockholder approval standing alone. It was undisputed that the Dexter board had not known of or anticipated Invitrogen's proposal when they approved the Loctite sale, and that although the board intended to find a merger partner or buyer for its remaining asset, the Invitrogen proposal came as a pleasant surprise. *Id.* at *2.

The district court cited *Noddings* as authority for the step-transaction doctrine and described the test (which ISP originally advocated) as "a useful analogy in grapping with what appears to be a novel question of law." *Id.* at *7. But rather than applying the *Noddings* formulation, the *ISP* court applied a weaker, black-letter version of the doctrine under which "if each of the steps has independent economic significance, is not a sham and was undertaken for a valid business purpose, the steps will not be collapsed." *Id.* (quoting Fletcher, *Cyclopedia of the Law of Private Corporations* § 6970.145).

Using this formulation, the *ISP* court had little difficulty finding that the step-transaction doctrine did not apply on the facts presented. The court found that the Loctite sale had independent economic significance because Dexter would receive $400 million for the assets. The court noted that "there is no suggestion that the sale was not undertaken for a valid business purpose" and could not be characterized as a "'sham' transaction." *Id.* The court also cited the fact that each transaction was an arms' length bargain and that Dexter had no control over Loctite, Ahlstrom, or Invitrogen. *Id.* Elsewhere, the *ISP* court observed that "[t]he transactions at issue in this case were not entered into pursuant to one unified agreement." *Id.* at *6. The court concluded that "[i]n this case, it is clear that Dexter had the self-proclaimed intention of selling off all or substantially all its assets, but even ISP's own criticisms of [Dexter's] strategy reveal that the Invitrogen merger was not a 'done deal' at the time of the Loctite and Ahlstrom agreements." *Id.* at *8. But although Dexter "had the objective of selling off all or substantially all its assets," *id.* at *6, the *ISP* court declined to require a stockholder vote "in the absence of any evidence indicating that the transactions were prearranged or interdependent," *id.* at *8.

Compare the facts of *ISP* with *Sharon Steel.* In both cases, the debtor entity sought to achieve a specific end result. The debtor in *Sharon Steel* embarked on a *de facto* liquidation, and Dexter had the objective of selling off substantially all its assets. At the time both debtors chose their course, neither had executed agreements for all of the component transactions. UV had agreed to the Federal sale, but had not yet found a buyer for its oil and gas properties or entered into the asset sale with Sharon Steel. Dexter had agreed to the Ahlstrom sale and the Loctite sale, but had not yet been approached by Invitrogen. To the extent that timing supports an inference of connectedness, the *ISP* timeline was far more compressed. The Dexter transactions materialized over the course of a week; while the UV transactions spanned two years. Yet in *Sharon Steel*, the transactions were viewed together, while in *ISP* they were not.

I struggle to harmonize these outcomes. Technically, the *ISP* court applied Connecticut law, while the *Sharon Steel* court applied New York law, but the *ISP* decision does not appear to turn on choice of law issues. Potentially more apropos, the *ISP* court construed the statutory requirement for a stockholder vote under a provision analogous to Section 271 of the DGCL while the *Sharon Steel* court interpreted a successor obligor provision in an indenture. There is authority suggesting that the concept of "substantially all" could mean different things in these differing contexts.[3] The Trustee has stressed these authorities in arguing that the term "substantially all" in the Successor Obligor Provision should allow Liberty less freedom of action than would the same term under Section 271. *Cf. Hollinger Inc. v. Hollinger Int'l, Inc.*, 858 A.2d 342, 377 (Del. Ch. 2004) (interpreting "substantially all" under Section 271 and holding that "[a] fair and succinct equivalent to the term 'substantially all' would therefore be 'essentially everything'").

I have difficulty perceiving how "substantially all," when used generically as an undefined term, could have a different meaning in an indenture than in a corporate statute. *See Concord Real Estate CDO 2006-1, Ltd. v. Bank of Am. N.A.*, 996 A.2d 324, 331 (Del. Ch. 2010) (discussing value of uniform interpretations). Using standardized

[3] *See B.S.F. Co. v. Phila. Nat'l Bank*, 204 A.2d 746, 750 (Del. 1964) (applying Pennsylvania law; "We are of the opinion that this question is not necessarily to be answered by references to the general law concerning the sale of assets by a corporation. The question before us is the narrow one of what particular language of a contract means and is to be answered in terms of what the parties were intending to guard against or to insure."); *see also Sharon Steel*, 691 F.2d at 1049 ("The words 'all or substantially all' are used in a variety of statutory and contractual provisions relating to transfers of assets and have been given meaning in light of the particular context and evident purpose."). Neither case need be read as partitioning the interpretation of "substantially all" into contractual and statutory sectors. In *B.S.F.*, the corporation relied on statutory precedents for the proposition that "a sale of assets, no matter how large, was not a prohibited sale if it fulfilled corporate purposes." *Id.* at 749. For the Delaware Supreme Court to have rejected that argument does not imply that "substantially all" means something different when written in an indenture rather than a statute. In *Sharon Steel*, the court observed that "substantially all" must be applied in different contexts, thereby recognizing the inherently fact-specific nature of the analysis. Judge Winter did not call for compulsory interpretive balkanization.

expressions and terms of art in an indenture enables "a better and quicker understanding of those provisions and a substantial saving of time not only for the draftsmen but also for the parties and all others who must comply with or refer to the indenture." American Bar Foundation, *Commentaries on Indentures* 3 (1971) [hereinafter *Commentaries*]. The term "substantially all" did not spring forth from the inspired mind of a creative drafter of a form indenture. It has long been part of the corporate lexicon. *See Hollinger*, 858 A.2d at 376-86 (describing history of statutory term in Delaware). In New York, the term appears to have made its statutory debut in 1954 as part of an amendment to Section 20 of the New Stock Corporation Law. Prior to the 1954 amendment, Section 20 broadly required the consent of two-thirds of outstanding shares in order to "sell and convey [a corporation's] property, rights, privileges and franchises, or any interest therein or any part thereof . . . ." N.Y. Stock Corporation Law § 20 (1951). "To make clear that the authorization of stockholders was necessary only as to a sale not made in the regular course involving all or substantially all of the corporation's business . . . the Legislature enacted a bill to amend section 20." *In re Rosenshein*, 16 A.D.2d 537, 539 (N.Y. App. Div. 1962). The bill specifically stated that shareholder authorization would be required only for dispositions of "all or substantially all of its property rights, privileges and franchises, or an integral part thereof essential to the conduct of the business of the corporation." 1954 N.Y. Laws 1864. The "substantially all" language was drawn from the then-new 1950 edition of the Model Business Corporation Act. *See* N.Y.B.C.L. § 909 revision notes; Rod J. Howard, *Recent Case Law Developments Addressing Sales of "All of Substantially All" Assets*, 1459 PLI/Corp. 243, 265-66 (2004).

When an indenture uses the otherwise undefined concept of "substantially all," it draws on a familiar term with attendant content and connotations. The Successor Obligor Provision in this case and the standard form successor obligor provision found in the *Commentaries* use other familiar corporate verbs like "consolidate," "merge," "assign," "transfer," "lease," and "convey." It is hard to fathom that a plain reading of the word "merge" – when used as an undefined term – could generate one meaning in an indenture and another under the corporate statute that gives life to the debtor entity. The same is true for "substantially all." Not surprisingly, courts applying New York law have interpreted successor obligor provisions in light of cases construing the corporate statutes that govern sales of "all or substantially all" the corporations assets. *See, e.g.*, *Angeion Corp.*, 615 N.W.2d at 432-33 (collecting cases); James Gadsden, *All or Substantially All Assets*, 13 J. Bankr. L. & Pract. 6 (2004) (same); *see also* McGimpsey & Hensley, *supra*, at 46 ("[T]he courts have not drawn such a distinction [between contractual and statutory usages.]").

The purposes of the contractual and statutory provisions likewise parallel each other and point towards uniform interpretation. As explained by the *Sharon Steel* court, successor obligor provisions ensure that lenders enjoy "a degree of continuity of assets." *Sharon Steel*, 691 F.2d at 1051. At the same time, they allow borrowers to "to sell entire businesses and liquidate, to consolidate or merge with another corporation, or to liquidate their operating assets and enter a new field free of the public debt," so long as the debt follows substantially all of the assets. *Id.* The provisions thus provide corporations with flexibility while protecting bondholders from being severed from the assets that will repay the debt.

Corporate statutes like Section 271 operate in similar fashion. The provisions "were enacted to address the common law rule that invalidated any attempt to sell all or substantially all of a corporation's assets without unanimous stockholder approval." *Hollinger*, 858 A.2d at 376. The substitution of a voting requirement gave corporations flexibility while at the same time empowering stockholders to protect themselves "from fundamental change, or more specifically . . . from the destruction of the means to accomplish the purposes or objects for which the corporation was incorporated and actually performs." *Gimbel v. Signal Cos.*, 316 A.2d 599, 606 (Del. Ch. 1974) (internal quotation omitted), *aff'd* 316 A.2d 619 (Del. 1974). Like the successor obligor provision, Section 271 and its statutory cousins allow corporations to engage in transactions while protecting stockholders against radical change.

I therefore cannot harmonize *ISP* and *Sharon Steel* by distinguishing the former as a statutory case and the latter as a bond case. Reading between the lines, I believe the equities played a major role in the *ISP* decision. The party seeking to aggregate transactions through the step-transaction doctrine in *ISP* was a hostile bidder whose arguments smacked of tactical expediency. Invitrogen had signaled that it did not want assets other than Life Technologies, so the threat of a negative stockholder vote on the Loctite sale would give ISP bargaining leverage. Perhaps ISP, itself a specialty chemical company, wanted to acquire Dexter's specialty polymer business for itself. Moreover, ISP had launched a hostile tender offer for Dexter at $45 per share, while the board's efforts generated an alternative transaction promising $62.50 per share. Rather than allowing stockholders to protect themselves against an undervalued transaction – the core purpose of a Section 271 analogue – the statutory vote would ratchet up the risk of losing the higher valued transaction. The Invitrogen merger already was subject to a stockholder vote and the Ahlstrom sale was conditioned voluntarily on a stockholder vote, both of which would allow stockholders to express their views on the deal. ISP's obvious self-interest likely affected how the court viewed the case.

Were I to follow *ISP*, then I could readily reject any suggestion that the Liberty transactions should be aggregated. The Liberty transactions "were not entered into pursuant to one unified agreement," 2000 WL 35453111, at *6, and the Capital Splitoff was "not a 'done deal' at the time of the [earlier distributions]" *id.* at *8. Although I agree with the *ISP* court that the step-transaction doctrine is an appropriate doctrinal tool for considering aggregation, I believe the *ISP* decision applied that doctrine too narrowly. I therefore will use the step-transaction doctrine to determine whether to aggregate the Liberty transactions mindful of the *Sharon Steel* court's broader approach, including its willingness to consider the transactions the debtor had not yet identified at the time its board embarked on its *de facto* liquidation plan.

C. No Aggregation Here

Having reviewed the documentary record and listened to the witnesses testify at trial, I find that the Capital Splitoff is not sufficiently connected to the LMI and Discovery spinoffs or the LEI splitoff to warrant aggregating the four transactions. Each of the transactions resulted from a distinct and independent business decision based on the facts and circumstances that Liberty faced at the time. Although the transactions share the same theme of distributing assets to Liberty's stockholders, they were not part of a master plan to strip Liberty's assets out of the corporate vehicle subject to bondholder claims. Rather, each transaction reflected a context-driven application of the overarching business strategy that Liberty has followed since separating from AT&T: consolidate ownership of businesses where Liberty can exercise control or has a clear path to control, while exploring all possible alternatives for assets that do not fit this profile. In pursuit of this strategy, Liberty has engaged regularly in acquisitions, dispositions, complex swaps, and when other alternatives were less attractive, spinoffs and splitoffs. It has not followed a strategy of disposing of substantially all of its assets.

The three lenses of the step-transaction doctrine bring the picture into sharper focus. The binding-commitment test is not met. None of the four transactions was connected contractually to any of the others.

The interdependence test also is not met. Each of the transactions was a distinct corporate event separated from the others by a matter of years. The LMI spinoff was announced on March 15, 2004 and completed on June 7, 2004. The Discovery spinoff was announced on March 15, 2005 and completed on June 21, 2005. The LEI splitoff and related DirecTV merger were announced on September 3, 2008 and completed on November 19, 2009. The Capital Splitoff was announced on June 20, 2010 and will be completed no earlier than May 2010. Each of the transactions stood on its own merits. None was so interdependent on another that it would have been fruitless in isolation.

This leaves the end result test, which applies if separate transactions appear to be components of a single overarching plan to achieve a desired ultimate result. If the evidence at trial had shown, as in *Sharon Steel,* a plan to engage in *seriatim* distributions that would remove assets from Liberty's corporate form and evade the bondholders' claims, then those otherwise separate transactions could be aggregated to determine if the end result constituted a disposition of substantially all of Liberty's assets. Under those circumstances, I would have compared Liberty's business mix as it existed when the plan was adopted with Liberty's business mix as it will exist after the Capital Splitoff. The evidence, however, does not support such a plan.

It is certainly true that the Capital Splitoff and its predecessors have been part of Liberty's broad and dynamic business strategy. After separating from AT&T, Liberty sought to transform itself from a holding company with a "fruit salad" of non-cash-generating minority positions into an owner of controlling stakes in cash-generating operating companies. In the pursuit of this goal, Liberty management has employed a variety of signature tactics, including swapping minority equity positions for assets that Liberty wanted to own, actively managing the Company's capital structure, utilizing tracking stocks, acquiring businesses outright, and, when other alternatives were unattractive, pursuing spinoffs and splitoffs. It is also true that Liberty management has referred to its signature tactics as "strategies" and spoken of a "disaggregation strategy."

Nevertheless, the evidence shows that Liberty has not pursued a unified disaggregation strategy with a sufficiently well-defined starting point or a sufficiently definitive end result to warrant applying the step-transaction doctrine. Instead, Liberty management has deployed different tactics depending on the facts on the ground. If Liberty had been able to consolidate ownership of international cable systems more rapidly and without facing massive capital requirements, then Liberty management could well have decided to grow that business internally. If Liberty management had pursued that course, they might well have chosen international cable over home shopping and elected not to acquire 100% of QVC. But when the goal of consolidating an international cable business encountered financial and regulatory hurdles, Liberty elected to spin off LMI and build around QVC.

Liberty likewise did not conceive of and pursue the Discovery spinoff and LEI splitoff as instrumental components of an overarching disaggregation plan. Liberty sought to obtain control over Discovery or to monetize its stake. It was only when its partners blocked these efforts that Liberty spun off its interest in Discovery. The LEI splitoff likewise resulted from evolving business events. Liberty obtained its initial stake in DirecTV thanks to opportunistic purchases of News Corp. securities and prolonged negotiations with the Murdoch family. Liberty then attempted to establish a path to control at DirecTV, but the DirecTV charter prevented Liberty from acquiring control unless Liberty owned 100% of the entity. At the time, in the midst of the financial crisis, financing was not available. Liberty therefore backed into the spin-merge structure. If Liberty had not encountered the obstacles that led to these dispositions, Liberty could well have retained some or all of the assets, capitalized on synergies with QVC or other businesses, and charted a different course.

Notably absent from this case are factors that might suggest a conscious plan to achieve a particular endpoint through asset dispositions. If the spinoffs and splitoffs occurred more proximately in time, as in *Sharon Steel*, then the argument for aggregation would be stronger. Here, the transactions took place over the course of seven years under distinct circumstances.

Similarly, if there were cause to believe that Liberty was attempting to evade the legitimate claims of bondholders by removing cash-generating assets from the corporate structure, then a conscious disaggregation strategy would be more plausible. If the bonds were maturing soon and Liberty faced difficulty in paying off or refinancing the debt, then a controlling stockholder like Malone might well benefit by removing assets from the corporate vehicle subject to the bondholder claims. The majority of Liberty's debt will not mature for quite some time: The earliest tranche is due in 2013, but other tranches will not mature until 2023, 2029, 2030 and 2031. The assets that have been distributed over the past seven years were either largely non-cash-generating (the non-controlling positions in Discovery and DirecTV) or required a major and risky infusion of debt capital for growth (LMI). They were not the type of cash-generating operating businesses to which lenders typically look for repayment. Liberty's cash-generating engine – QVC – has and will remain subject to the bondholders' claims.

Following a consistent business strategy and deploying signature M&A tactics does not transmogrify seven years of discrete, context-specific business decisions into a single transaction. Liberty has engaged in acquisitions and divestitures as part of the regular course of its business. Liberty did not engage in an "overall scheme" to sell substantially all of its assets. *Sharon Steel*, 691 F.2d at 1050.

On the facts of this case, aggregation is not appropriate. The Trustee recognizes that the Capital Splitoff, viewed in isolation, does not constitute a disposition of substantially all of Liberty's assets. Accordingly, Liberty is entitled to a declaration that the Capital Splitoff does not violate the Successor Obligor Provision.

III. CONCLUSION

Plaintiffs are entitled to judgment declaring that the Capital Splitoff as currently structured complies with the Successor Obligor Provision. The parties shall prepare a final decree, agreed as to form, to implement this ruling. **IT IS SO ORDERED.**